



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

4/20/98 LB

APR 17 1998

Ms. Kumkum Ray
Department of the Interior
Minerals Management Service
Mail Stop 4024
381 Elden Street
Herndon, VA 20170-4817

Re: Postlease Operations Safety

Dear Ms. Ray:

As you know, the Office of Advocacy of the U.S. Small Business Administration (SBA) was established by Congress under Pub. L. No. 94-305 to advocate the views of small business before federal agencies and Congress. Advocacy is also required by §612 of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612) to monitor agency compliance with the RFA. On March 28, 1996, President Clinton signed the Small Business Regulatory Enforcement Fairness Act which made a number of significant changes to the Regulatory Flexibility Act, the most significant being provisions to allow judicial review of agencies' regulatory flexibility analyses.

On February 13, 1998, your office published a proposed rule in the *Federal Register*, Vol. 63, No. 30, p. 7335 on Postlease Operations Safety. The proposed rulemaking updates and clarifies MMS regulations on postlease operations. The proposal allows MMS to grant an easement and a right of use for an outer Continental Shelf tract to a State lessee. It also clarifies the distinction between granting and directing a suspension, sets out criteria to disqualify an operator with poor operating performance from acquiring any new leaseholdings, and requires written accident reports. The Minerals Management Services certified that the proposal will not have a significant economic impact on a substantial number of small entities.

Preliminarily, the Office of Advocacy notes that MMS departed from its old practice of simply providing an unsubstantiated statement that the proposed rule will not have a significant economic impact on a substantial number of small entities and instead, in this case, included a factual statement allegedly in support of its certification. While the Office of Advocacy appreciates the fact that MMS attempted to comply with the RFA, the Office of Advocacy questions the absence of supporting data in the factual statement as well as the propriety of the certification.



Certification of the Rulemaking May be Inappropriate

The Office of Advocacy asserts that the proposal may have a significant economic impact on a substantial number of small entities. Since the factual statement in support of the certification and the preamble to the rule was void of specific data on firm size and receipts, the Office of Advocacy consulted The Number and Percent of Firms, Establishments, Employment, Annual Payroll, and Estimate Receipts by Industry and Employment Size which was prepared by the United States Census Bureau, Department of Commerce under contract by the Office of Advocacy, Small Business Administration, Washington, DC.¹ The study provides industry data arranged by Standard Industry Codes (SIC).

For the purposes of its analysis, the Office of Advocacy referred to SIC 1381, Drilling Oil and Gas Wells. While Advocacy acknowledges that SIC 1381 may include more than drilling on the outer Continental Shelf, Advocacy submits the numbers for the sake of argument in an effort to point out the inherent weaknesses in MMS's certification.

According to this SIC data, there are a total of 1380 firms that drill oil and gas wells. Of that 1380 firms, 1341 or 97% qualify as small firms in that they have fewer than 500 employees; 654 firms have 1-4 employees. The 654 firms constitute 47% of all firms large and small. Needless to say, 47% of an industry represents a substantial number of firms and suggests that certification of this rulemaking may be improper.

In the 1-4 employee sector, the estimated receipts for a firm are \$46,774, with an annual payroll of \$32,187. The estimated costs of the proposed rule is \$7,350 (\$2,350 per application and \$5,000 for the rental) per year. The \$7,350 amounts to approximately 16% of the annual receipts for that sector. Although there are no hard rules for defining significant economic impact on a substantial number of small entities, a proposal that will impose on 47% of an industry an additional cost of 16% of annual receipts should at least raise a warning sign for a regulatory agency that the proposal could interfere with profits and company survival. It should also indicate to the agency that certification may be improper under the RFA.

MMS May Need to Prepare an Initial Regulatory Flexibility Analysis

The Office of Advocacy's threshold analysis indicates that this rulemaking may have a significant economic impact on a substantial number of small entities. In this particular instance, MMS should perform a similar type of analysis to determine whether certification is indeed proper for this rulemaking. MMS should use the data that it has on the industry such as number of firms, firm size, income, etc. to perform the threshold analysis. If MMS's threshold analysis still concludes that the proposal will not have a significant

¹ The Number and Percent of Firms, Establishments, Employment, Annual Payroll, and Estimate Receipts by Industry and Employment Size is available on the Office of Advocacy's home page. The website address is www.sba.gov/ADVO/stats.

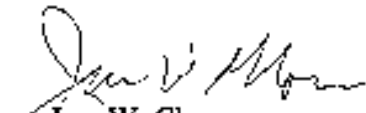
economic impact, MMS may certify the rule along with a factual statement setting forth the data and explaining why the data supports a conclusion that the rule will not have a significant economic impact on a substantial number of small entities. If MMS's threshold analysis garners result similar to Advocacy's, MMS should perform an initial regulatory flexibility analysis (IRFA) to determine the full effects of this rulemaking on small businesses and examine alternatives to minimize the impact on small businesses.² In either event, MMS should publish the amended certification or IRFA for public comment as well as extend the comment period.

The public has the right to information about the true nature of a proposal. Full disclosure of information is necessary for the public to ascertain the expected impact of a regulation, consider the alternatives, and submit meaningful comments. By providing the requisite information, MMS will not only be assisting the industry, the industry in turn may help MMS achieve its objective and MMS will also be abiding by the law.

If you would like to discuss this matter or if this office can be of any further assistance, please contact Jennifer A. Smith. She may be reached either by mail at the above address or by telephone at (202) 205-6943.

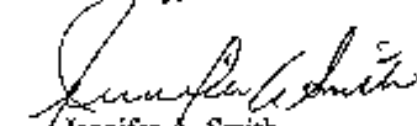
Thank you.

Sincerely,



Jere W. Glover
Chief Counsel

Sincerely,



Jennifer A. Smith
Assistant Chief Counsel

² In Southern Offshore Fishing Association v. Daley, 1998 WL 125775, the Department of Commerce prepared a Final Regulatory Flexibility Analysis (FRFA) at the final rulemaking following comments submitted in response to the agency's certification of no significant economic impact on a substantial number of small businesses. The United States District Court for the Middle District of Florida stated that an agency cannot prepare an adequate FRFA following a certification because the agency cannot possibly comply with § 604 by summarizing and considering comments on an IRFA that the agency never prepared.